Supreme Court, U.S.
FILED

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No. 03-___

IN THE

Supreme Court of the United States

MARK WOOD,
Petitioner,

v.

CHARLIE GREEN, CLERK OF THE
CIRCUIT COURT FOR LEE COUNTY, FLORIDA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented For Review

1. Are persons with disabilities who suffer episodic incapacity by flare-ups of their condition and are unable, due to the nature of their disability, to state the exact day that they will return to work, deprived of the benefit the Americans with Disabilities Act (ADA)?
2. Is the reasonableness of a requested accommodation for a leave of absence to recuperate from an episodic flare-up of cluster headaches to be denied as a question of law when the employee cannot state the exact day he or she will return to work or is the reasonableness of the accommodation a question for the jury under the individualized fact-by-fact attention required by *School Bd. of Nassau County v. Arline,* 480 U.S. 273, 287 (1987)?
3. Could a reasonable jury, by evaluating all of the evidence, together with the logical inferences, in the light most favorable to Wood, have determined that Wood's request for a leave of absence to allow his cluster headaches to subside was a reasonable accommodation under the ADA?

List of Parties to the Proceeding and Corporation Disclosure

The caption of the case contains the names of all the parties, *i.e.*, Mark Wood, who is the Petitioner, and Charlie Green, Clerk of the Circuit Court for Lee County, Florida, who is the Respondent. There is no corporate party in this action and thus there is no parent or publicly held company owning 10% or more of any corporation stock.

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Citation of the Official Report of the Opinion Entered in the Case

The Eleventh Circuit Opinion upon which the Petition for Writ of Certiorari is sought was reported as *Wood v. Green*, 323 F.3d 1309 (11th Cir. 2003).

Statement of the Basis for Jurisdiction

(i) March 13, 2003 is the date of entry of the judgment of the Eleventh Circuit Court of Appeals sought to be reviewed.

(ii) May 9, 2003 is the date of the Order Denying the Petition for Rehearing and the Petition for Rehearing En Banc.

(iii) Reliance on Rule 12.5 is not applicable.

(iv) This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) which provides that cases in the Court of Appeals may be reviewed by the Supreme Court by Writ of Certiorari after rendition of the judgment or decree of the Court of Appeals.

(v) Notifications required by Rule 29.4(b) or (c) are not applicable.

Statement of the Case

1. Statement of the Course of Proceedings and Disposition Below

Wood sued Green, Clerk of the Circuit Court for Lee County. 1-1-1.[1] The complaint alleged that the Clerk violated the American with Disabilities Act (ADA) when he terminated Wood's employment. 1-1-1-9. After answering the complaint, the Clerk moved for summary judgment, which was denied. 1-12-1; 1-27-1; 3-68-1-4. The matter proceeded to trial before a Senior Visiting Judge, Neil P. McCurn. 3-27-1. At the close of Wood's case, the Clerk moved for judgment as a matter of law (JMOL)on Wood's ADA claim. 3-92-1. The district court reserved ruling on the motion, and the Clerk renewed the motion at the close of all the evidence. 10-130-140. After the matter was submitted to the jury, the jury rendered a verdict for Wood on his ADA claim. 3-100-1-4. A judgment was entered in Wood's favor for back pay of $109,033 and reinstatement. 3-105-1-2.

The Clerk renewed his motion for JMOL. 4-111-1. Wood responded. 4-119-1. The district court denied the motion in a 17-page decision. *See* Appendix. Green appealed.

The Eleventh Circuit Court of Appeals, Judges Dubina, Hill and Cox presiding, entered an Opinion on March 13, 2003 reversing the district court's order denying Green's motion for JMOL and rendered judgment in favor of Green. *See* Appendix. Petitioner's petition for rehearing en banc

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[1]Although citations to the record may not be necessarily required in a Petition for Writ of Certiorari, they are provided in this Petition. "1-1-1" means Volume 1, docket document 1 and page 1 of docket document 1 of the Record at the Eleventh Circuit.

and for panel rehearing were denied on May 9, 2003. *See* Appendix.

This Petition for Writ of Certiorari timely followed within 90 days.

2. Basis for Federal Jurisdiction

This Petition for Writ of Certiorari seeks review of a judgment of the Eleventh Circuit Court of Appeals. The initial basis for Federal jurisdiction in the trial court was that the United States District Court had original jurisdiction under 28 U.S.C. §1331 because this action arose under the laws of the United States. In particular, this is an action pursuant to 42 U.S.C. §12101 *et seq.*, the Americans With Disabilities Act of 1990, as amended (ADA).

Jurisdiction to review the final judgment entered in the trial court rests in the Eleventh Circuit Court of Appeals under 28 U.S.C. §1291 which permits circuit courts of appeals to entertain appeals from final orders of district courts.

This Court has jurisdiction to review the decision of the Eleventh Circuit Court of Appeals under a Petition for Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

3. Statement of the Facts Necessary to Argument of the Issues

Wood worked for the Lee County Clerk's office for 25½ years from August 1974 through January 5, 2000. 6-126-5-7; 7-127-78. Wood first began experiencing severe headaches in 1978. 6-126-11. In 1985, Wood's headaches would last a week, two weeks or longer. 6-126-13. In February, 1990, Wood was diagnosed in Houston, Texas as having cluster headaches. 6-126-38-39;7-127-138. In 1990, after Wood returned from Houston, the Clerk's office created a special position for Wood by removing his supervisory responsibilities and creating the position as

court's coordinator so that Wood's absences would not be a problem for the office. 6-126-45-46. The essential function of the new position consisted of review of new legislation and Rule changes that effected the court-side of the Clerk's office. 6-126-47. Fifty percent of Wood's time was spent on these functions. 7-127-189.

Wood's attendance greatly improved from 1991-1994. P/Exh.'s[2] 37, 40, 42 and 45; 6-126-67-73. Despite missing seven full weeks of work in 1995 and twelve weeks in 1996, Wood's September, 1996 appraisal stated, "During this past year Mark was able to achieve most of his goals." 6-126-82-83. Pursuant to the employee manual under which Wood worked, the Clerk had the discretion to grant leaves of absence without pay when Wood exhausted his vacation, sick and personal days and FMLA time. 7-127-23; P/Exh. 129. During all this time, the Clerk never required Wood to provide a date when he would return from his leaves of absence. 7-127-100. September, 1999, was the first time in 25 years that Wood did not receive a pay increase. 7-127-117.

On 12/6/99, Wood requested in writing a leave of absence to recover from an episode of cluster headaches. P/Exh. 85; 6-126-113. Shortly after the letter request, Wood called Green and Green told Wood not to worry about his job. 6-126-130. Green approved in writing a leave of absence without pay for Wood on 12/6/99, effective 12/3/99, with no termination date. 6-126-134-135;P/Exh. 66. Wood's doctor wrote a letter to Green dated December 6, 1999, which was not received by the Clerk's office until December 30, 1999 (due to secretarial turnover in the doctor's office) advising

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[2]"P/Exh." means Plaintiff's Exhibit in the trial court.

of his care and treatment of Wood. 7-127-147-148. Wood was terminated by the Clerk's office on 1-5-00. 7-127-140.

Wood testified that he could perform the essential functions of his job after he returned from his leaves of absence. 6-126-163. Wood believed that his work was left for him while he was on leave because he returned from absences to find a large amount of reading and work to be accomplished. *Id.* at 163. Wood had no mandatory day-to-day tasks, no secretary and no supervisory responsibilities. *Id.* at 165. Wood's request for a leave of absence was to allow him to recuperate from his cluster headaches and then return to work, as had been the routine in the past. *Id.* at 165. The maximum prior leaves were in the 1-2 month range (4-121-10), except for three months in 1990 when Wood went to Houston. 6-126-35. No witness offered any evidence that Wood's absences caused any undue hardship.

Green gave five reasons for Woods termination:

1. Excessive absences (the prime reason), 10-130-97;
2. No letter from a doctor (letter was received from a doctor);
3. Wood's failure to pay $400 for the insurance; (on the morning of the and prior to the termination, Wood's wife promised the money in two days), 9-129-67;
4. Wood's job had been absorbed by the rest of the department (no pleading offering this defense); and
5. There was no action on Wood's part that gave him comfort that Wood really wanted to work at the Clerk's office. 10-130-106

No evidence was offered of any change between December 6, when the leave of absence was granted, and December 31, 1999 (when Green made the decision to terminate Wood) to explain why what was considered a

reasonable accommodation when granted had suddenly become an undue hardship.

Argument and Authorities

The Eleventh Circuit Court of Appeals in this action has entered a decision which conflicts the First Circuit in *Garcia Ayala v. Lederle Parenterals,* 212 F.3d 638 (1st Cir. 2000), the Ninth Circuit in *Kimbro v. Atlantic Richfield Co.,* 889 F.2d 869 (9th Cir. 1989) and *Humphrey v. Memorial Hospital Association,* 239 F.3d 1129 (9th Cir. 2001), the Sixth Circuit in *Cehrs v. Northeast Ohio Alzheimer Research Center,* 155 F.3d 775 (6th Cir. 1998) and two Federal district court decisions dealing specifically with cluster headaches.

Alternatively, if the Eleventh Circuit decision in this action is *not* in direct conflict with the decisions of other U.S. Court of Appeals decisions on the same important matter, then the Eleventh Circuit has decided an important question of Federal law that has *not* been squarely, but should be squarely, addressed and settled by this Court.

In any event, the Eleventh Circuit Court of Appeals decision conflicts with the individualized case-by-case approach to ADA cases mandated by this Court in *School Bd. of Nassau County v. Arline,* 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed. 2nd 307 (1987).

The trial judge, Senior U.S. District Judge, Neal P. McCurn, in denying Green's motion for JMOL, distinguished *Duckett v. Dunlop Tire Corp.*, 120 F.3d. 1222 (11th Cir. 1997) from the unique facts of the Wood case. Memorandum-Decision and Order. *See* Appendix, p. 9A. Judge McCurn found that Green's argument that Wood asked for an unreasonable accommodation in the form of indefinite leave ignored the unique history of the parties and the nature of Wood's disability. *Id.* Judge McCurn found that due to the nature of cluster headaches, Wood admittedly

could not give a date certain when he would be able to return to work. *Id.* However, Judge McCurn found the outer limits of Wood's absences could reasonably be approximated due to Wood's 14-year experience with cluster headaches. *Id.* Judge McCurn found that Wood's request for a reasonable accommodation in December, 1999 was *not* for indefinite discretionary leave, rather it was circumscribed by past experience and that past experience indicated that Wood would be able to return to work within a month or two. *Id.* Therefore, Judge McCurn found that Wood's requested accommodation for discretionary leave was not unreasonable as a matter of law in this unusual circumstance and not inconsistent with *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222 (11th Cir. 1997). *Id.* at 10-11.

The Eleventh Circuit disagreed with Judge McCurn and his reading of *Duckett* and held that Wood's requested accommodation was not reasonable as a matter of law because he could not state the exact day he would return to work (although Green never asked him to state when he would return).

The Question of Whether an Accommodation Is Reasonable Is a Fact Question for the Jury

The second element in an ADA claim is whether the claimant is able to perform the essential functions of his job, with or without a reasonable accommodation. *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1255 (11 Cir. 2001). Given the unique nature of Wood's job, a reasonable jury could find that his request for a leave of absence was a reasonable accommodation. The question of whether Wood was able to perform the essential functions of his job with the requested accommodation is a jury question. *Cehrs v. Northeast Ohio Alzheimers Research Center*, 155 F.3d 775 (6th Cir. 1998) (genuine issue of fact as to whether granting further medical

leave to an employee would have constituted a reasonable accommodation under the ADA and precludes a summary judgment). *Cehrs* states that the employee's initial burden of articulating a reasonable accommodation need not be onerous. *Id.* at 781. For the purposes of a prima facie showing, the plaintiff must merely "suggest the existence of a plausible accommodation, the costs of which, facially, do not exceed its benefits." *Id.* In *Cehrs*, the plaintiff had psoriasis and experienced episodic temporary flare-ups necessitating absence from work. *Id.* at 777. *Cehrs* states that a presumption that uninterrupted attendance is an essential job requirement improperly dispenses with the burden shifting analysis set forth in *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173 (6th Cir. 1996). The burden shifting analysis of *McDonnell Douglas* is applied in ADA cases. *Wascura v. City of South Miami*, 257 F.3d 1238, 1241 (11th Cir. 2001). *Cehrs* stated that under such a presumption that uninterrupted attendance is an essential job requirement, the employer never bears the burden of proving that the accommodation proposed by the employee is unreasonable and imposes an undue burden upon it, *citing Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869 (9th Cir. 1989) (plaintiff suffered cluster headaches in *Kimbro*). The Eleventh Circuit erred by never getting to the burden shifting analysis adopted by this Court in *Wascura* for ADA cases and erred by ruling as a matter of law on a fact question which should be decided by the jury or argued herein.

Additionally, the Eleventh Circuit interpreted Wood's request as a request for an "indefinite" leave, thereby disregarding the historical pattern of Wood's cluster headaches with the Clerk's office. Holding that Wood's request was for an indefinite leave of absence and ignoring the historical pattern of prior leaves violates the

individualized attention required for ADA cases as directed by this Court in *School Bd. of Nassau County v. Arline*, 480 US 273, 287, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987). In *Arline*, a school teacher was fired from her job because of her susceptibility to TB and brought an action alleging that her dismissal violated the Rehabilitation Act.[3] The U.S. District Judge for the Middle District of Florida entered judgment for the school board employer and the teacher appealed. The Eleventh Circuit reversed and remanded. Certiorari was granted by the this Court. This Court held that the school teacher was a handicapped individual within the meaning of the Rehabilitation Act and the case was remanded to determine whether Arline was otherwise qualified for the job with the instruction that *the district court must conduct an individualized inquiry and to make appropriate findings of fact. Such an inquiry was found by this Court to be essential if the court is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes or unfounded fear.* In the case at bar, the Eleventh Circuit ignored the findings of the jury and the trial judge which did give individualized inquiry to the unique facts of the case. The Eleventh Circuit ignored, and apparently determined irrelevant, that Wood's previous and current leave of absence had caused no undue hardship on the employer. It is impossible to examine a reasonable accommodation under the individualized inquiry required by this Court by failing to consider the effect of the accommodation on the employer. The Eleventh District

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[3]Decisions construing the Rehabilitation Act have been held appropriate for construing ADA cases. *Dockery v. Northshore Medical Center*, 909 F.Supp. 1550 (S.D.Fla. 1995).

never reached the issue that Wood's absences imposed no undue hardship on Green because it held that since he couldn't state the exact day he would return, his request was for indefinite leave and unreasonable as a matter of law.

The Code of Federal Regulations to implement the Americans With Disabilities Act provides that *permitting the use of unpaid leave for necessary treatment is a specific accommodation that may be appropriate for particular situations.* 29 CFR Pt. §1630.2(o). In *Dockery v. North Shore Medical Center,* 909 F.Supp. 1550 (S.D. Fla. 1995), the trial court noted that neither the ADA nor the Regulations provide any guidance as to how long the additional unpaid leave must be and that the reasonableness of this interpretation is *generally a question of fact* which normally precludes the granting of a summary judgment. In *Dockery*, the court did find that a request for a leave of absence of one year was, on its face, unreasonable. In the case at bar, the leave would have been less than two months.[4]

The Eleventh Circuit erroneously applied its prior decision in *Duckett v. Dunlop Tire Corp.,*120 F.3d 1222 (11th Cir. 1997) and held that indefinite leaves of absence are unreasonable on their face, without considering other relevant evidence and also erred by finding that Wood's request was for indefinite leave. In *Duckett*, the Eleventh Circuit noted that the employee's need for leave was for an indefinite period — not just a month or two. In the case at bar, past experience dictated that the leave requested by Wood would have been a month or two. Additionally,

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[4]Wood's doctor advised Green on 2-15-00 that Wood had had no significant headache since the third week in January, 2000, and asked the Clerk to reconsider the termination. P/Exh. 84.

Wood was not asked, nor was his doctor asked, on December 6, 1999 to estimate the period of the leave. Neither Wood nor his doctor was given the opportunity to state that the leave would probably be for a month or two. The Eleventh Circuit stated in *Duckett* that the plaintiff could not represent that he *likely* would have been able to return in a month or two. (emphasis added.) Wood and his physician were never asked when Wood would return to work. Wood's physician told Green on 2-15-00 that Wood had had no headaches since the third week in January, 2000, and asked the Clerk to reconsider Wood's termination. *See* n.4. herein., if they had been asked, would have been able to state that it was *likely* that he would have been able to return to work in a month or two. Green never asked for a time limit and gave every reason for Wood not to expect that he had to provide a time limit because he was given an open-ended leave of absence on 12-3-99 and told not to worry about his job. *The Clerk waived any definiteness in the duration of the leave. Duckett* adopts another court's statement that a "reasonable accommodation is by its terms most logically construed as that which, presently, *or in the immediate future*, enables the employee to perform the essential functions of the job in question." (emphasis added), *citing Myers v. Hose*, 50 F.3d 278, 284 (4th Cir. 1995). A month or two is the immediate future.

The Eleventh Circuit in this action overlooked the fact that this case went to trial on one leave of absence — a leave requested on 12-6-99, not as future speculative leaves. The Eleventh Circuit speculated that Wood *could* be stricken with another cluster headache soon after his return and require another indefinite leave of absence. There was no evidence at trial on the subject of future leaves of absences. Furthermore, such speculation violates the law of other

circuits which have considered the issue by granting certiorari. In *Humphrey v. Memorial Hospital Association,* 239 F.3d 1129 (9th Cir. 2001), the court held that the ADA does not require an employee to show that a leave of absence is certain or even likely to be successful to prove that it is a reasonable accommodation. All that has to be shown is that the leave of absence could *plausibly* enable the claimant to adequately perform the job.

Garcia Ayala v. Lederle Parenterals, 212 F.3d 638 (1st Cir. 2000) stated that some employees, by the nature of their disability, are unable to make an absolutely assured time for their return to employment, but that does not necessarily make a request for leave to a particular date indefinite and that each case must be scrutinized on its own and that *an unvarying requirement for definiteness departs from the need for the individualized factual evaluation as required by this Court* in *Arline, supra.* In *Harper v. Honda of America Mfg., Inc., 1998 W.L. 1788072 (S.D. Ohio),* the court held that whether one was qualified and had requested a reasonable accommodation must be examined in light of possible reasonable accommodations and that it may be that an employer is able to grant an employee a leave of several years without pay without incurring significant costs.

In summary, the Eleventh Circuit's analysis of this case eliminates any disabled person with episodic incapacity who cannot state the exact day he or she will return to work from the protection of the ADA. This was not the intent of Congress in enacting the ADA. An individualized inquiry as to each job is required. The jury performed its task in the case at bar. The Eleventh Circuit ignores that individualized inquiry and applies a stereotyped presumption that a leave of absence for a person with cluster headaches is unreasonable because he cannot state a day certain he will return. The

Eleventh Circuit ignores that the leaves of absences had not caused undue hardship to Green. This was because the job was especially created to tolerate Wood's absences. This case was analyzed by the jury and the trial judge on Wood's specially created job. That is the individualized inquiry that is required.

Every other federal court that has dealt with cluster headaches has determined that leaves of absence to resolve cluster headaches are reasonable, i.e., *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869 (9th Cir. 1989), *Dutton v. Johnson County Board of County Commissioners,* 859 F.Supp. 498 (D. Kan. 1994) and *Carlson v. Inacom Corp.*, 885 F.Supp. 1314 (D. Nev. 1995). The facts of the prior Eleventh circuit decision in *Duckett* are distinguishable — the facts in the Wood case are unique, were found by the jury and trial judge to be unique and the requested accommodation was determined to be reasonable. Whether the accommodation is reasonable is a fact question and the panel erred when it took that determination from the jury. The Eleventh Circuit eliminates all disabled persons who cannot state the exact day they will return to work from the protection of the ADA. This is not what Congress intended. The Eleventh Circuit is out of step with the First, Sixth and Ninth Circuits and with this Court's mandate in *Arline*.

CONCLUSION

This case presents an important question and justice requires that this Court specifically address the issue by granting certiorari.

Respectfully submitted,

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